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In the Supreme Court of the United States

OCTOBER TERM, 1954

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 15, 1955, which remanded the case to the Board with instructions to conduct further proceedings.

ORDERS AND OPINIONS BELOW

The order of the court below (Appendix A, *infra*, pp. 1a–2a) is reported at 219 F. 2d 441. No separate opinion accompanied this order. The findings of fact, conclusions of law and order of the Board (R. 392a–537a) are reported at 108 N. L. R. B. No. 81.

JURISDICTION

The order of the court below (Appendix A, *infra*, pp. 1a–2a) was entered on February 15, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. at 147, 29 U. S. C. 160 (e).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly held that the question of whether or not all of the officers of a labor organization have filed the non-Communist affidavits required by Section 9 (h) of the National Labor Relations Act may not be litigated in a Board unfair labor practice proceeding but is a matter for the Board to investigate and determine in separate administrative proceedings.

2. Whether the Board could properly hold that, in the absence of purposeful evasion as provided in its Rules and Regulations, the term "officer" within the meaning of Section 9 (h) is limited exclusively to a person occupying a position identified as an office in a union's constitution.

STATUTE AND RULE INVOLVED

Section 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 146, 29 U. S. C. 159 (h), provides:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of

employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

Section 102.13 (b) of the Board's Rules and Regulations is set out in Appendix B, *infra*, pp. 3a–4a.

STATEMENT

This case arises out of an unfair labor practice proceeding commenced before the National Labor Relations Board on a complaint brought by a union against respondent Coca Cola Bottling Co. of Louisville, Inc. During the proceedings, respondent sought to litigate the question of

whether there had been full union compliance with the non-Communist affidavit requirements of Section 9 (h) of the National Labor Relations Act, as amended. The Board, in finding that respondent had committed certain unfair labor practices, held, *inter alia*, that (a) the compliance status of the union under Section 9 (h) was a matter for determination by the Board in collateral administrative proceedings and not one which should be litigated directly in an unfair labor practice case; and (b) in any event respondent's offer of proof related to a union employee who did not come within the definition of a union "officer", within the meaning of Section 9 (h) of the Act (R. 527a–531a). When the Board requested the Court of Appeals for the Sixth Circuit to enforce its remedial order, that court ordered the case remanded to the Board with directions to reopen the record in the unfair labor practice proceedings, so as to permit respondent to adduce evidence as to the union's Section 9 (h) compliance status (Appendix A, *infra*, pp. 1a–2a).

The detailed facts pertinent to the issues raised in this petition for certiorari may be summarized as follows:

1. *Proceedings before the Board:* On May 17 and October 16, 1951, the United Brewery and Soft Drink Workers Local 20 (the Local), an affiliate of the Congress of Industrial Organizations (the CIO), filed unfair labor practice charges alleging that respondent had violated Sections 8 (a) (1) and 8 (a) (3) of the Act. The Board's General Counsel thereupon issued a com-

plaint based on these charges (R. 5a–7a), it having been theretofore administratively determined that the Local and its affiliated unions, including the CIO, had complied with the non-Communist affidavit requirements of Section 9 (h) of the Act (R. 27a–29a, 516a–517a).

At the hearing on the complaint before a Board trial examiner, respondent sought to show that the CIO was not in compliance with Section 9 (h) of the Act because one W. B. Taylor, CIO regional director for Kentucky and allegedly an officer of the CIO, had not filed a non-Communist affidavit. In support of its position respondent offered to adduce evidence purporting to show that Taylor's duties and functions were such as to make him an officer of the CIO within the meaning of Section 9 (h) (R. 517a, 527a). The trial examiner rejected the offer, holding, in conformity with the uniform decisions of the Board, that the question of compliance was a matter for administrative determination by the Board, and was not litigable by the parties in the unfair labor practice proceeding (R. 517a–518a). On the merits the trial examiner found that respondent had violated Sections 8 (a) (1) and 8 (a) (3) of the Act, as alleged in the complaint (R. 395a–515a, 521a).

2. *The Board's Decision:* The Board upheld both the trial examiner's rulings on the procedural question and his findings on the merits (R. 526a–533a). Reaffirming its rule that "the compliance status of a union which is required

to comply is a matter for administrative determination, and not one to be litigated in complaint or representation proceedings", the Board explained (R. 528a–529a):

> A recognition of the [n]eed to expedite the hearing of cases and the resolution of issues on their merits was the reason for the adoption, and still is the reason for the retention, of this rule. Although adhering to such rule, the Board has nevertheless permitted, and even encouraged, parties to Board proceedings to bring to the Board's attention matters affecting the compliance status of unions. The Board thus has specifically provided in Section 102.13 (b) (3) of its Rules and Regulations, Series 6, as amended, for an investigation "where the Board has reasonable cause to believe" the filing requirements of Section 9 (h) of the Act are being purposely evaded, as is now contended by the Respondent. To assist the parties in calling such matters to its attention, the Board has adopted the policy of having its agents release to interested parties, under proper safeguards, names of designated union officers and of persons who have filed the required affidavits. Furthermore, the Board will entertain motions regarding the compliance status of unions, will consider such information as may be submitted in determining whether a situation warrants further investigation, and has in fact conducted such investigations. If the need therefor is shown, the

> Board will conduct a hearing in which the issue can be heard and determined. The decision thus afforded the parties to institute collateral proceedings, and to have compliance matters heard and decided, is real and not illusory for the outcome of such a collateral proceeding may affect the substantive aspects of a pending case. [Footnotes omitted.]

The Board then pointed out that respondent did not avail itself of the Board's established procedure for determining compliance questions. It noted (R. 530a) that respondent, although apprised of Taylor's failure to file a non-Communist affidavit, did not request a collateral administrative proceeding but, instead, sought to raise the issue in the unfair labor practice case.

The Board further stated (R. 530a–531a) that, even if respondent, in accordance with the Board's practice, had properly raised the compliance question in a separate collateral proceeding, respondent's offer of proof would fall short of establishing that Taylor was an "officer" within the meaning of Section 9 (h) under the test previously adopted by the Board and incorporated in Section 102.13 (b) (3) of its Rules and Regulations (see

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[1] Prior to the institution of the unfair labor practice hearing, and thereafter again in course of the hearing, respondent requested and obtained compliance information from the Board which, among other things, disclosed that Taylor had not filed a non-Communist affidavit. (R. 528a, fn. 7; 25a–29a).

Appendix B, *infra*, p. 4a). Under this test, the Board treats as an "officer" a person occupying a position identified as an office in the union's constitution, or occupying a position which the union has omitted from the designation of officers in its constitution for the purpose of evading or circumventing the filing requirements of Section 9 (h). Applying this test, the Board found that Taylor was not an "officer" since it did not appear either that Taylor was occupying a position listed as an office in the CIO constitution or that the position which he occupied had been omitted from the constitution in order to evade or circumvent the filing requirements of the Act.

Accordingly, the Board concluded that the CIO was in compliance with the filing requirements of Section 9 (h), and entered an appropriate remedial order (R. 533a–537a).

The CIO's constitution (Article IV, Section 1) lists the following officers: president, executive vice president, secretary-treasurer and eight vice presidents, all elected by a majority vote at its annual convention. Neither the current constitution nor the constitutions prior to the enactment of the Taft-Hartley Act listed the position of regional director as an office. The regional directors are under the supervision of the CIO's organizational department which in turn is directed by the executive vice president (Article V, Section 5, of the CIO's constitution); Hardman & Neufeld, *The House of Labor* (Prentice-Hall, Inc., 1951), p. 113; Report to the CIO by President Walter P. Reuther, 15th Constitutional Convention (1953), p. 28.

Two of the four Board members (Chairman Farmer and Member Rodgers), who participated in the decision in the instant case, joined in the conclusion that the CIO was

3. *Proceedings in the Court of Appeals:* Upon the Board's petition for enforcement of its remedial order, the Sixth Circuit, without passing upon the merits of the Board's unfair labor practice findings, ordered the case remanded to the Board for further proceedings (Appendix A, *infra*, pp. 1a–2a). The court noted in its order that concededly Taylor had not filed a Section 9 (h) affidavit; that respondent had offered to prove that Taylor is "an officer of the CIO" exercising "administrative and executive powers over" the Local and a "working control over every CIO local union and affiliated national union which operates within the Commonwealth of Kentucky and the CIO region"; and that the trial examiner, with the subsequent approval of the Board, had excluded this evidence and would not permit the question of noncompliance to be raised in the unfair labor practice proceeding. Relying on this Court's decision in *National Labor Rela-*

in compliance with the Act under the Board's "constitutional test", but reserved decision on whether such test is "the exclusive basis for determining compliance" (R. 531a, n. 15). Chairman Farmer and Member Rodgers have since followed and applied the "constitutional test" in other cases without reservation. See *General Shoe Corp.*, 109 N. L. R. B. No. 88 and *Crown Upholstering Co.*, 110 N. L. R. B. No. 49.

[1] In the court below respondent made no suggestion that Taylor's position had been omitted from the CIO's constitution for purposes of evasion; it contended, *inter alia*, that the Board's "constitutional test" was, in the light of the purposes sought to be achieved by Section 9 (h), too narrowly drawn.

tions Board v. *Highland Park Manufacturing Co.*, 341 U. S. 322, the court stated that "respondent is entitled to a judicial review of the legal question whether there has been compliance with Section 9 (h)" of the Act. Accordingly, it remanded the case to the Board "with instructions to permit respondent to introduce testimony as to the functions and extent of jurisdiction of said W. B. Taylor as Regional Director of the CIO and with instructions to make relevant findings of fact and conclusions of law and to certify the same to [the] court."

REASONS FOR GRANTING THE WRIT

The Court of Appeals has erroneously determined two questions of major importance in the administration of the National Labor Relations Act. Furthermore, that court's holding on the question of the right to litigate compliance status under Section 9 (h) of the Act in a complaint proceeding is in direct conflict with decisions in two other circuits.

Both questions are present, potentially at least, in every unfair labor practice or representation proceeding that comes before the Board. If the Board should be required to follow the decision below in all such proceedings, determination of the merits in complaint and representation matters will become subject to great delay, and the Board's ability to perform its statutory functions under the Act will be substantially impaired.

1. In rejecting the Board's settled rule that the compliance status of a union under Section 9 (h) of the Act is a matter for the Board's administrative determination and not one to be litigated in an unfair labor practice or representation proceeding, the holding below is in square conflict with the decision of the Seventh Circuit in *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, and with the decision of the Fifth Circuit in *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, certiorari denied, 348 U. S. 873.

In *American Rubber*, as here, the employer offered to prove in the course of the unfair labor practice hearing before the trial examiner that an individual who had not filed a non-Communist affidavit was "an officer or at least a *de facto* officer of the union" involved in that case. The court agreed with the Board that the issue was not triable in a hearing on the merits, stating (214 F. 2d at 55): "This question of fact was a matter for the Board's own administrative determination and was not a matter which petitioner was entitled to raise and litigate in an unfair labor practice proceeding." Similarly, in *Vulcan Furniture* the court sustained the examiner's rejection of a similar offer, stating (214 F. 2d at 371): "We find no authority in the statute supporting the view that the * * * completeness of the affidavits may be challenged in a defense to [complaint] proceedings conducted by the

Board". Cf. *National Labor Relations Board v. Sharples Chemicals, Inc.*, 209 F. 2d 645, 650–651 (C. A. 6).

Contrary to the decision below, the question presented here was not resolved, but was left open, by this Court in *National Labor Relations Board v. Highland Park Mfg. Co.*, 341 U. S. 322. There, this Court held that the question whether the CIO or A. F. of L. was a national or international labor organization within the meaning of Section 9 (h) presented, upon the "admitted facts", a naked issue of law which was litigable in an unfair labor practice proceeding and subject to judicial review. The Court, however, drew a distinction between the necessity of compliance by a labor organization and the fact of compliance, saying (p. 325)—

> If there were dispute as to whether the CIO had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented. But here there is no question of fact.

It is this reserved question which is here presented, namely, whether the Board can determine administratively if the CIO has filed the required affidavits.

The Board is of the view that ascertainment of a union's compliance status has been committed by Congress to the Board's administrative deter-

mination without requiring litigation of the question in unfair labor practice or representation proceedings. The legislative history of Section 9 (h) indicates that Congress in enacting that provision sought especially to safeguard against, and avoid, "indefinite" or "endless delays" which administration of that section might entail in the resolution of the merits of unfair labor practice or representation proceedings.* Manifestly, to permit litigation of such compliance questions in every unfair labor practice or representation proceedings, as the decision below requires, would necessarily hamper the administration of the Act,

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* See statements of Senator Taft at 93 Cong. Rec. 6444, 6447, 6860 (Legislative History of the Labor Management Relations Act, 1947, pp. 1542, 1547, 1625). The Joint Committee on Labor Management Relations, which was created by the Taft-Hartley Act, Section 401, Labor Management Relations Act, 1947, 61 Stat. 136, 160, to study and investigate the administration and operation of existing Federal laws relating to labor relations, in its 1948 report to Congress stressed that in any consideration of amendments to Section 9 (f), (g) and (h) it was important to bear in mind that (S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 45):

"Board hearings must be confined to evidence going into merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives."

See also *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 845 (C. A. 4); *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 922 (C. A. 6), certiorari denied *sub nom. Ann Arbor Press, Inc.* v. *National Labor Relations Board*, 342 U. S. 859; *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6).

tend to submerge adjudication of the merits in these proceedings in a welter of side issues and thus defeat the objective of Congress to provide a speedy resolution of cases on the merits.

The delays inherent in such litigation are even more serious under what may be characterized as the "functional test" which the court below adopted, as opposed to the Board's "constitutional test", as to the meaning of the term "officer" in Section 9 (h). Under the test which the decision below embraces,[6] it would appear that, if litigation of compliance issues is permitted in hearings on the merits, proof and counterproof would have to be allowed on a case-to-case basis, whenever an issue of the identity of union officers was raised, with respect to virtually every person performing any duties for the charging union, its international and every other affiliated union, whether or not the position occupied by such person is listed or omitted from the union's constitution.[7] The Board believes, in agreement with the Fifth and Seventh Circuits, that "Congress did not intend that each of the numerous proceedings instituted by the Board upon complaints of violation of the

[6] The court below did not attempt to define the scope of its "functional test". In its brief to the court below, respondent urged that the term "officer" included "every person * * * whose duties, responsibilities and influence in said union measured up to those of an officer as the word 'officer' is usually understood by the American people".

[7] E. g., stewards, organizers, committeemen, international representatives, regional directors, coordinators, etc.

statute against parties throughout the nation should be delayed and determined on a case-to-case basis with all the attendant opportunities for delay in the functioning of the processes of the Act." *National Labor Relations Board v. Valley Furniture Mfg. Co.*, 214 F. 2d 369, 371 (C. A. 5).

In contrast to the litigation method, the administrative method adopted by the Board assures fulfillment of the Congressional purpose without opening the door to the indefinite and endless delays in the resolution of cases on the merits which Congress sought to guard against. It is the Board's practice (*supra*, pp. 6–7) to permit parties to representation or complaint proceedings to cause to be instituted an administrative investigation of those compliance matters which the Board may properly decide, in collateral proceedings before the Board. Upon a proper showing the Board will conduct a hearing in which that issue can be heard and determined. This administrative method of handling the identification of persons as union officers fully and effectively achieves the objective of the Act, but without unnecessary interference with other types of proceedings.

2. In remanding the case to the Board to take evidence with respect to "the functions and extent of jurisdiction of * * * W. B. Taylor as Regional Director of the CIO", the Court of Appeals also rejected the Board's "constitutional test" for determining the meaning of "officers" subject to the filing requirements of Section 9 (h). The Board believes that its test is fully consistent with the basic objectives of the Act and is proper and valid. Since Section 9 (h) does not define the term "officers", Congress must be presumed to have used the word in its usual and ordinary sense. *United States* v. *Stewart,* 311 U. S. 60, 63. Unions, like other organizations, normally list their officers in their constitutions and by-laws. Just as the officer of a private corporation, the officer of a labor organization "is created by the charter". *Vardeman* v. *Penn Mut. Life Ins. Co.,* 125 Ga. 117, 119, 54 S. E. 66, 67.

The Board's construction of the meaning of the term "officers" is reasonably designed to achieve the basic objective of Congress to rid labor unions of Communist leadership. Balancing the competing considerations, Congress apparently concluded that the eradication of Communist influence from the most prominent positions of labor organizations would extirpate the main possibilities of Communist control. While Congress could have extended the filing requirements to all influential agents of the labor organization, it did not see fit to do so. For example, in the Com-

munist Control Act of 1954, 68 Stat. 775, 777, 778,[8] which withdraws from "Communist-infiltrated" organizations certain benefits conferred upon labor organizations by the National Labor Relations Act, the term "Communist-infiltrated" is defined to include substantial direction, domination, or control "by an individual" or group of "individuals", irrespective of the individuals' position in the organization.

Finally, it should be noted that since the Board's definition of the meaning of "officers" as used in Section 9 (h) "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new", it is entitled to "peculiar weight". *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.[9]

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[8] See Sections 7 and 10 which amended the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781 *et seq.*

[9] In August 1947, contemporaneously with the effective date of the 1947 amendments, the General Counsel instructed all personnel responsible for handling of compliance matters that the "officers" required to file non-Communist affidavits "shall include all persons described as 'officers' in the International, National and/or local constitutions and by-laws." This interpretation was subsequently embodied in Section 102.13 (b) of the Board's Rules and Regulations, Series 6, promulgated November 29, 1949, 14 Fed. Reg. 1934, 1938. The rule, as published, made it clear that, where the Board finds persons occupying posi-

The court below, although rejecting the Board's "constitutional test", did not attempt to define the test which it would substitute for that of the Board. Presumably, it agreed with respondent that the determinative factor is not whether the position in question is listed in the union's constitution but whether it encompasses "duties" and "responsibilities" of such a nature as to carry "influence" in the union. The difficulties of applying such a test with its lack of objective standards are manifest and would go far to render Section 9 (h) administratively unworkable.

CONCLUSION

Each of the two issues presented in this case is of substantial importance in the administration of the Act, and the decision of the court below on one of them is in square conflict with decisions of two other courts of appeals. It is respectfully submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
National Labor Relations Board.

MAY 1955.

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tions fraudulently omitted from the list of offices in the union constitution, the Board will require the incumbents to file the necessary affidavits.

APPENDIX A—COURT OF APPEALS ORDER

United States Court of Appeals for the Sixth Circuit

Docket No. 12,316

Order February 15, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COCA-COLA BOTELING COMPANY OF LOUISVILLE, INC., RESPONDENT

Before ALLEN, MARTIN and MCALLISTER, Circuit Judges.

This case came on to be heard upon the record and briefs and oral argument of counsel:

And it appearing that respondent at the hearing herein contended that W. B. Taylor, CIO Regional Director for Kentucky, is an officer of the CIO and is required under Section 9 (h) of the Labor Management Relations Act, 29 U. S. C. § 159 (h), to file a non-Communist affidavit;

And it being conceded that said W. B. Taylor had not filed such an affidavit;

And it appearing that in support of its contention respondent offered to show that said W. B. Taylor is an officer of the CIO, that he exercises administrative and executive powers over United Brewery and Soft Drink Workers Local 20, and

exercises a working control over every CIO local union and affiliated national union which operates within the Commonwealth of Kentucky and the CIO region;

And it appearing that the Trial Examiner excluded this evidence and would not permit the question of noncompliance to be raised in the unfair labor practice proceedings, in which action the Trial Examiner was sustained by the Board;

And it appearing that respondent is entitled to a judicial review of the legal question whether there has been compliance with Section 9 (h); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325, 326;

The case is hereby remanded with instructions to permit respondent to introduce testimony as to the functions and extent of jurisdiction of said W. B. Taylor as Regional Director of the CIO and with instructions to make relevant findings of fact and conclusions of law and to certify the same to this court.

Approved for entry:

(S) FLORENCE E. ALLEN,
United States Circuit Judge

APPENDIX B—RULE INVOLVED

Section 102.13 (b) of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 Fed. Reg. 1934; 1938, provides:

> SEC. 102.13. * * *
>
> (b) for the purpose of the rules and regulations in this part, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:
>
> (1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period; listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.
>
> (2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports

any organization that believes in or teaches, the overthrow of the United States Government by force ~~or by any ill~~legal or unconstitutional methods.

(3) The term "officer" as used in subsection (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9 (h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9 (h) of the act.